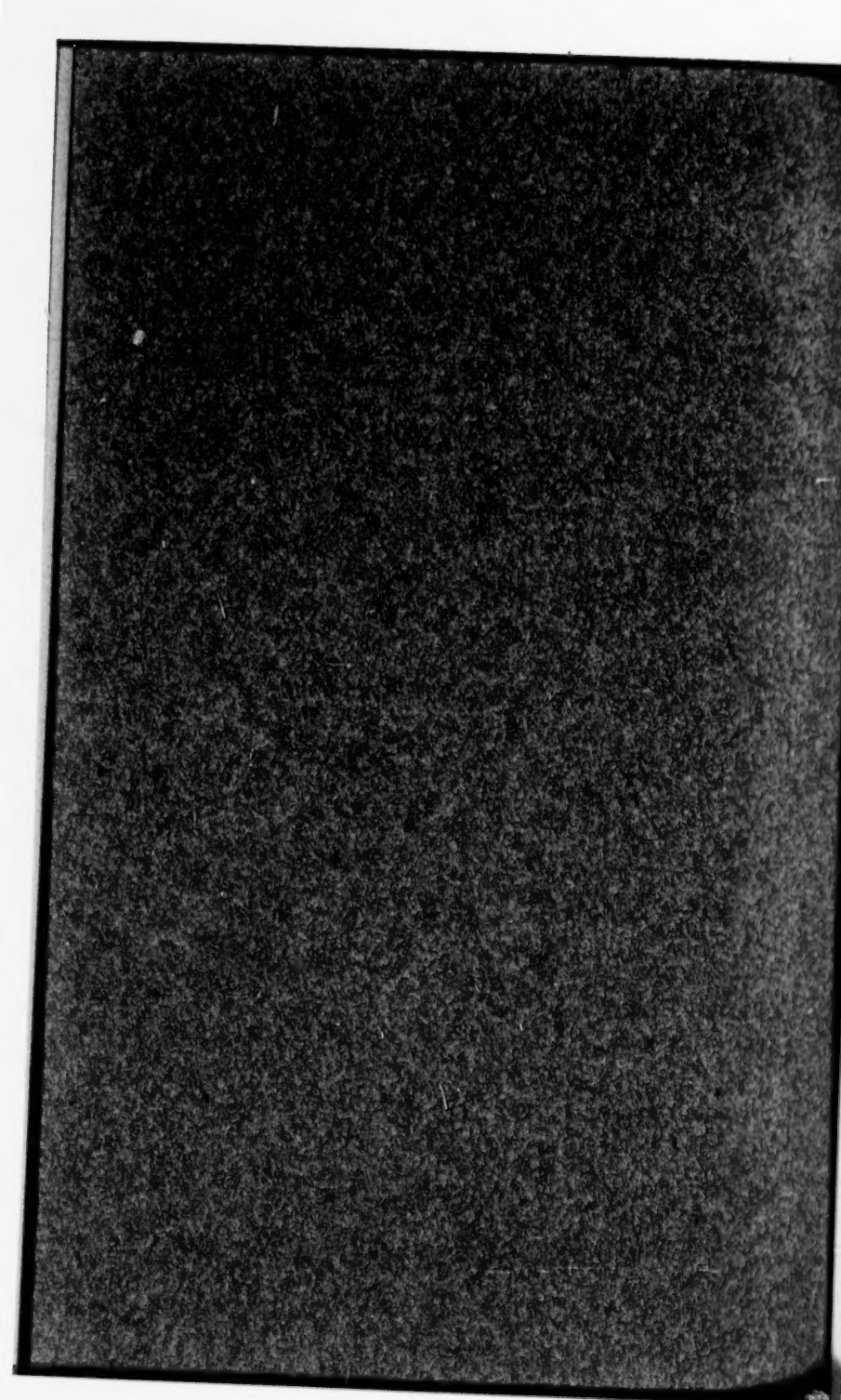
BRIEF FOR APPELLEE



In the Supreme Court of the United States.

OCTOBER TERM, 1905.

JOSEPH NAGANAB, APPELLANT,
v.
ETHAN ALLAN HITCHCOCK, SECRETARY OF the Interior. } No. 247.

ON APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLEE.

Joseph Naganab, the appellant herein, filed his petition in the Supreme Court of the District of Columbia, asking that defendant, appellee here, be restrained from all or any further act or acts done and intended to be done in execution of the act of Congress approved June 27, 1902, entitled "An act to amend an act entitled 'An act for the relief and civilization of the Chippewa Indians in the State of Minnesota,' approved January fourteenth, eighteen hundred and eighty-nine." (32 Statutes, 400.)

The defendant demurred to the bill (record, p. 27) upon the grounds stated as follows:

1. That there is a defect of parties complainant.

2. That the bill is bad in substance, in that it does not set out any facts sufficient to entitle the complainant or the real party in interest, the Chippewa Indians of Minnesota, to the relief prayed for or to any relief.

3. That the court has no jurisdiction over the subject-matter of the suit.

This demurrer was sustained and the bill of complaint dismissed. Upon appeal to the Court of Appeals of the District of Columbia the decree dismissing the bill was affirmed (Record, pp. 30–34). From that decree of affirmance the complainant has appealed to this court.

The sole ground of this suit is the alleged unconstitutionality of said act of Congress approved June 27, 1902. It should be further stated that the sales advertised as stated in the bill of complaint (Record, p. 25) for December 5 and 28, 1903, were held as advertised, prior to the hearing of this petition by the justice of the Supreme Court of the District of Columbia, and at that hearing the solicitor stated in open court that his client had no complaint to urge against such sales.

EFFECT OF DEMURRER.

The rule as to the effect of a demurrer and as to the matters admitted thereby to be true is so clearly stated by the Court of Appeals for the District of Columbia in the case of *Maese* v. *Herman* (17 App. D. C., 52, 59) that we quote it as follows:

> It is a well-settled principle in the law of demurrer that while the demurrer admits as true

> for the purposes of the decision invoked by it all facts well and sufficiently pleaded, yet it does not admit as true mere matters of law which the pleader may think proper to state in his pleadings, nor the conclusions drawn from the facts stated therein. That is for the court exclusively. Nor does the demurrer in any manner admit the correctness of an allegation as to the construction of a statute, or of a grant or other document or official act that may be insisted upon by the pleader as the foundation of his claim and title or that may be set up in opposition thereto. That is matter of law for determination by the court. These propositions are too clear to require citations of authority for their support.

The averments in this bill, which amount to a statement of the legal effect of any law, or document, or act of an officer of the Government, of which the court takes judicial notice, are not admitted as true by the demurrer filed. There are certain facts of which the courts will take judicial notice in the absence of any allegation, or even in the face of an allegation setting forth a different state of things. (Daniels's Chancery Pleading and Practice, Vol. I, p. 522, fifth ed.)

In the case of *Knight* v. *United States Land Association* (142 U. S., 161, 168–169), in the statement of the case, the court said:

> To understand precisely the exact nature of the questions involved in this case, a somewhat more detailed statment of facts than is contained in the above findings of the referee will be found

useful. These facts are not contradictory of those findings, and are recited in former decisions of this court, statutes of the United States and of the State of California, and the records of the Interior Department, of all of which the court can take judicial notice.

The dealings of the Government with the Indian tribes within the geographical limits of the United States, but no part of the body politic, form such an important phase of the political history of the country that the courts will take judicial notice of those dealings as shown by acts of Congress, public documents printed by authority of Congress, orders and proclamations of executive officers, and the records of the Interior Department, which is, by sections 441 and 463, Revised Statutes of the United States, charged with the supervision of public business relating to the Indians.

THERE ARE CERTAIN RULES WHICH THE COURTS WILL OBSERVE IN CASES INVOLVING THE VALIDITY OF AN ACT OF CONGRESS.

This is a proceeding to secure a declaration from the courts that the act of Congress approved June 27, 1902 (32 Stat., 400), is unconstitutional and of no effect, and the intervention of the courts to prevent the executive officers of the Government from proceeding to administer it. The judiciary is asked to say that a coordinate branch of the Government has exceeded its powers. That the courts are ever reluctant to do, and in such cases will resolve every doubt in favor of the validity of the statute. The position assumed by this

Court was stated by Chief Justice Marshall as early as 1810, in *Fletcher* v. *Peck* (6 Cranch, 87, 128), wherein he said:

> The question whether a law be void for its repugnancy to the Constitution is at all times a question of much delicacy which ought seldom, if ever, to be decided in the affirmative in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station could it be unmindful of the solemn obligations which that station imposes; but it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers and its acts to be considered as void. The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other.

The rule was again stated by Chief Justice Waite in *Sinking Fund cases* (99 U. S., 700, 718), as follows:

> Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the Government can not encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule.

The position taken in these two cases has been recognized and accepted as the proper one in many other cases, among them being: *Powell* v. *Pennsylvania*

(127 U. S., 678, 684); *Angle* v. *Chicago, St. Paul, etc., Railway* (151 U. S., 1, 18); *Chicago and G. T. Ry. Co.* v. *Wellman* (143 U. S., 339, 346); *United States* v. *Old Settlers* (148 U. S., 427, 466); *Nicol* v. *Ames* (173 U. S., 509, 514–515; *The Japanese Immigrant Case*, 189 U. S., 86, 101).

The province of the judicial department and the extent of its duty in the premises in such cases is stated in Cooley's Constitutional Limitations (6th ed., p. 217), as follows:

> The constitutionality of a law, then, is to be presumed, because the legislature, which was first required to pass upon the question, acting, as they must be deemed to have acted, with integrity and with a just desire to keep within the restrictions laid by the Constitution upon their action, have adjudged that it is so. They are a coordinate department of the Government with the judiciary, invested with very high and responsible duties, as to some of which their acts are not subject to judicial scrutiny, and they legislate under the solemnity of an official oath, which it is not to be supposed they will disregard. It must, therefore, be supposed that their own doubts of the constitutionality of their action have been deliberately solved in its favor, so that the courts may, with some confidence, repose upon their conclusion as one based upon their best judgment.

The courts have no authority to inquire into the motives of the legislators or as to the expediency of the legislation, their right of inquiry being limited to the question of *power*. In *McCulloch* v. *Maryland* (4

Wheaton, 316, 423), after finding that the law there under discussion provided an instrument necessary as a means to effect legitimate objects of the Government, the court said:

> But were its necessity less apparent, none can deny its being an appropriate measure; and if it is, the degree of its necessity, as has been very justly observed, is to be discussed in another place. Should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution, or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the Government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land. But where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the Government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department and to tread on legislative ground. This court disclaims all pretentions to such a power.

In *United States* v. *Des Moines Navigation and Ry. Co.* (142 U. S., 510, 544) it was said:

> * * * The knowledge and good faith of a legislature are not open to question. It is conclusively presumed that a legislature acts with full knowledge and in good faith. It is true the bill alleges that its passage was induced by the navigation company by false represen-

> tations and threats of suits, but such an allegation amounts to nothing. In Cooley's Constitutional Limitations (5th ed., 222) the author, citing several cases, observes: "From what examination has been given to this subject, it appears that whether a statute is constitutional or not is always a question of power; that is, a question whether the legislature in the particular case, in respect to the subject-matter of the act, the manner in which its object is to be accomplished, and the mode of enacting it has kept within the constitutional limits and observed the constitutional conditions. In any case in which this question is answered in the affirmative the courts are not at liberty to inquire into the proper exercise of the power. They must assume that legislative discretion has been properly exercised." * * *

In *Angle* v. *Chicago, St. Paul, etc., Ry. Co.* (151 U. S., 1, 18) the decision in *Fletcher* v. *Peck* (*supra*) was quoted from, and it was said:

> * * * The rule, briefly stated, is that whenever an act of the legislature is challenged in court the inquiry is limited to the question of power, and does not extend to the matter of expediency, the motives of the legislators, or the reasons which were spread before them to induce the passage of the act. This principle rests upon the independence of the legislature as one of the coordinate departments of the Government. It would not be seemly for either of the three departments to be instituting an inquiry as to whether another acted wisely, intelligently, or corruptly.

The same rule is again laid down in *Lindsay & Phelps Co.* v. *Mullin* (176 U. S., 126, 146).

In *Luther* v. *Borden* (7 How., 1, 47) the necessity for the courts to carefully avoid passing beyond the appropriate sphere of their action was emphatically stated, and later, in *Taylor and Marshall* v. *Beckham* (178 U. S., 548, 580), that statement was quoted approvingly, and is as follows:

> The high power has been conferred on this court of passing judgment upon the acts of the State sovereignties and of the legislative and executive branches of the Federal Government, and of determining whether they are beyond the limits of power marked out for them respectively by the Constitution of the United States. This tribunal, therefore, should be the last to overstep the boundaries which limit its own jurisdiction. And, while it should always be ready to meet any question confided to it by the Constitution, it is equally its duty not to pass beyond its appropriate sphere of action, and to take care not to involve itself in discussions which properly belong to other forums.

Under our system of government the legislative, the executive, and the judicial department each has an appropriate sphere of action, and the continued existence of the Government upon the basis on which it was established demands that none of these branches shall invade the jurisdiction of any other. The judiciary should, with especial care, avoid trespassing upon the domain of either of the other branches, be-

cause it has properly and consistently resented any apparent tendency of either of those branches to invade its territory. The importance of the principles thus stated as preliminary to the examination of the questions directly involved here should be carried in mind in the further consideration of those questions.

THE BILL IS DEFECTIVE BECAUSE OF LACK OF PROPER PARTIES COMPLAINANT.

It is alleged that the complainant is a member of the band and tribe of Chippewa Indians in the State of Minnesota, and chief of the band or tribe formerly occupying the Fond du Lac Reservation; that he brings this suit for the benefit of himself and all other members of the bands or tribes of Chippewa Indians in Minnesota (Record, p. 1). By amendment there has been added to the allegations of the first paragraph of the bill the statement that complainant is a citizen of the United States. There is no allegation that he has any authority from the various bands of Indians, or from any one band, or even from any individual Indian, to institute and prosecute these proceedings.

Formerly, the Chippewa Indians claimed a right to a large section of country. This was what has been termed the ordinary Indian right and defined to be simply the right of occupancy, the fee remaining in the United States. (*Cherokee Nation* v. *Georgia*, 5 Peters, 1; *United States* v. *Cook*, 19 Wall., 591; *Beecher* v. *Wetherby*, 95 U. S., 517; *Buttz* v. *Northern Pacific R. R. Co.*, 119 U. S., 55, 67; *Missouri, Kansas and Texas Ry. Co.* v. *Roberts*, 152 U. S., 114.) In the course of time

these Indians ceded whatever right they had to this undefined tract of country and came to be gathered upon separate and distinct reservations established and defined under various treaties, laws of Congress, and Executive proclamations. (Red Lake, treaty of October 2, 1863, 13 Stat., 667; White Earth, treaty of March 19, 1867, 16 Stat., 719, and Executive orders, March 18, 1879, and July 13, 1883; Chippewa, treaties of February 22, 1855, 10 Stat., 1165, and March 19, 1867, 16 Stat., 719; White Oak Point, Executive orders, October 29, 1873, and May 26, 1874; Fond du Lac, treaty of September 20, 1854, 10 Stat., 1109, and act of Congress May 26, 1872, 18 Stat., 190; Mille Lac, treaties of February 22, 1855, 10 Stat., 1165, and May 7, 1864, 13 Stat., 693; Leech Lake, Treaty of February 22, 1855, 10 Stat., 1165, and Executive orders, November 4, 1873, and May 26, 1874; Grand Portage, treaty of September 3, 1854, 10 Stat., 1109; Bois Fort, treaty of April 7, 1866, 14 Stat., 765; Deer Creek, Executive order, June 30, 1883.) Whatever claim the Chippewa Indians had to the lands thus reserved was in the tribe and not in the individual Indian. No individual had any separable interest therein nor any interest which he could convey to another or which would descend to his heirs at his death. He lost all interest therein by separation from the tribe. In other words, it was communal tribal property.

This condition existed when Congress passed the act of January 14, 1889 (25 Stat., 642), authorizing negotiations with the Indians for the release of their claims

to the lands within said reservations, except those in Red Lake and White Earth, and so much of those as was not needed to make allotments in severalty to individual members of the tribes, as therein provided. The lands not needed for allotments were to be classified as pine and agricultural lands, the pine lands to be sold in the manner specified and the agricultural lands to be opened to settlement under the homestead laws, with the added provision that each homestead claimant should pay $1.25 an acre for the land taken by him. The money accruing from the disposal of these lands, after deducting the expenses incident to the cession thereof, the removal of the Indians, and the sale of the land, was to be placed in the Treasury of the United States to the credit "of all the Chippewa Indians in the State of Minnesota as a permanent fund." This fund was to draw interest at 5 per cent per annum for the period of fifty years after the allotments were made. One-half the interest was to be annually paid in cash in equal shares to the heads of families and guardians of orphan minors for their use; one-fourth to be annually paid in cash in equal shares per capita to all other classes of the said Indians; and the remaining one-fourth was to be devoted, under the direction of the Secretary of the Interior, to the establishment and maintenance of a system of free schools among said Indians. At the end of fifty years the permanent fund was to be divided and paid to all of said Chippewa Indians and their issue then living, in cash, in equal shares.

It is thus seen that the money arising from and representing whatever claim the tribe had in said lands remains tribal property. The cession was not made by the Indians as individuals, but was made by the various tribes, represented by two-thirds of their adult members. In the whole transaction the tribe, and not the individual, was recognized and treated with. Any injury done by a failure or refusal to carry out the provisions of the act of Congress under which the tribal interest in said lands was relinquished is an injury to the tribes. Any proceeding brought to prevent an apprehended injury arising out of a failure or refusal to carry out the provisions of said act of 1889 should be brought upon the authority of the tribes, given in the usual manner by the councils of the various tribes, or by business committees designated to look after tribal affairs. No individual has any separable or defined interest in the execution of the provisions of said act that would entitle him to be heard to complain that the provisions thereof were not being carried out. The Chippewa Indians of Minnesota are, according to the statements of this bill, divided into some ten distinct bands or tribes, and from the annual report of the Commissioner of Indian Affairs for 1902 these various bands or tribes numbered 7,933 individuals. The complainant appears here as a self-constituted champion of the public rights, showing and in fact claiming no authority from the tribes or any of them, or from any representative body thereof, or from any other individual member. He is not entitled to recog-

nition to prosecute this suit and to hamper the administration of public business and very possibly to endanger the best interest of the Indians. The further allegation that he is a citizen of the United States is of no importance in this connection. In *Hitchcock* v. *Big Boy* (22 App. D. C., 275) a question arose as to the power of Congress to place restrictions upon the individual Indian after he had become a citizen of the United States, respecting the use and control of his property, and the court said: "The matter of citizenship is an entirely extraneous thing and has nothing whatever to do with the case." The theory upon which this proposition is based has been recognized by this court in *United States* v. *Rickert* (188 U.S., 432), and *Matter of Heff* (197 U.S., 488.) That statement has even greater applicability here where the subject-matter is tribal in character. Tribal property or rights remain subject to the same rules as to control and disposition thereof, even though the individuals composing the tribe become citizens of the United States. The bill was subject to demurrer, because not brought upon the authority of the real parties in interest, and the action of the court below sustaining the demurrer and dismissing the bill of complaint should be affirmed.

THE BILL DOES NOT STATE FACTS WHICH SHOW THAT THE COMPLAINANT OR THE CHIPPEWA INDIANS ARE ENTITLED TO THE RELIEF PRAYED FOR.

The petition, paragraph 3, states that the bands and tribes of the Chippewa Indians have kept up and maintained their tribal and band relations and have

occupied and owned the lands and reservations in said State, afterwards described in the bill, up to the time of the passage of the act of Congress of January 14, 1889, entitled "An act for the relief and civilization of Chippewa Indians in the State of Minnesota." The allegation that the Indians "owned" these lands is not admitted as true by the demurrer. The legal effect of the treaties, acts of Congress, and Executive orders under which the reservations were established, in respect of the character of the claim of the Indians thereto, will be determined by the court without regard to the allegations in the bill as to the effect thereof. The petition further recites that in pursuance of said act the Indians ceded, relinquished, and conveyed to the United States certain of said reservations and certain parts of others, setting forth copies of the instruments of cession. (Record, pp. 2–18.)

It is alleged, paragraph 4, that the relinquishments were approved by the President of the United States, and a copy of his alleged approval is inserted (Record, pp. 19–20). It is further alleged that these relinquishments affect 3,355,771 acres; that the relinquishments were in trust for the purpose and upon the conditions stated in said act; that the Secretary of the Interior proceeded to examine and classify said lands, as said act requires, and that approximately 1,500,000 acres thereof were classified as pine lands and 1,855,000 acres as agricultural lands; that it is the right of the complainant and of the said Chippewa Indians to have said trust further and completely executed, ac-

cording to the terms and conditions thereof, as stated in sections 5, 6, and 7 of said act, which sections are quoted in the bill (Record, pp. 21–22).

It is further alleged, paragraph 5 (Record, pp. 22–23), that said trust was only partially executed in that only part of the agricultural lands and only part of the pine lands had been disposed of up to June 27, 1902, when Congress enacted an act entitled "An act to amend an act entitled 'An act for the relief and civilization of the Chippewa Indians in the State of Minnesota,' approved January 14, 1889;" that among the pine lands remaining undisposed of is all the pine land upon the reservations known as the Chippewa of Mississippi, Leech Lake, Cass Lake, and Winnebegoshish reservations, upon which there are approximately 600,000 acres of pine land and 300,000 acres of agricultural land; that said agricultural lands are worth $1.25 per acre, and the pine lands are worth upward of $10,000,000; that the act of Congress of June 27, 1902, was passed without the consent of the Chippewa Indians in Minnesota, or any of them, and in derogation of their rights and in contravention of the terms of the trust created by the act of January 14, 1889. It is further alleged that the complainant, with all the other Chippewa Indians in the State of Minnesota, had, at the passage of the act of June 27, 1902, and still has, a vested and indefeasible interest in the execution of said trust and the funds to be derived from such execution, which interest was and is valuable property; that said last-

named act is not only in violation of said trust, but in direct conflict and violation of Article V of the Constitution of the United States, in that it deprives the complainant and each and all of the Chippewa Indians in the State of Minnesota of their property without compensation and without due process of law; that the said last-named act is unconstitutional and absolutely void; but notwithstanding the unconstitutionality and invalidity of said act, the defendant herein, as Secretary of the Interior, has proceeded and is now proceeding to carry its provisions into effect, and has actually set aside and authorized the setting aside of nearly 300,000 acres of pine lands as a perpetual forest reserve, and refuses to sell and dispose of the same, as by the relinquishment required; that the value of the timber on the land so set aside is at least $3,000,000; that the complainant and each and all of the Chippewa Indians in the State of Minnesota will suffer damage in and to that amount by the carrying into effect of the said void act; that the defendant, as Secretary of the Interior, has prescribed rules and regulations for the sale of the timber on about 300,000 acres of pine land contiguous and adjoining the said proposed forest reserve, and for the sale of 95 per cent of the merchantable pine timber on the lands selected for such forest reserve; that the necessary result of carrying said rules and regulations into effect will be to reduce the salable value of the pine timber and the amount to be realized therefrom one-fourth, amounting to more than

$1,000,000; that the trust fund will be diminished to that extent; that the defendant, as Secretary of the Interior, has advertised for sale the pine timber on approximately 300,000 acres of said ceded lands, to take place December 5 and December 28, 1903, and that unless restrained by the process of this court the defendant, as Secretary of the Interior, will sell the said pine timber under said rules and instructions under said act, to the irreparable injury of the complainant and of all the Chippewa Indians in the State of Minnesota.

The complainant then prays that summons issue, that the defendant be temporarily enjoined from all or any further acts under said act of Congress of June 27, 1902; that the defendant be perpetually enjoined from all or any further acts under said act of Congress; that the defendant be required to completely execute the said trust and fully account to complainant, as provided in the act of January 14, 1889; that complainant have leave at any time to amend his bill, and for general relief.

THE UNCONSTITUTIONALITY OF AN ACT OF CONGRESS IS NOT OF ITSELF SUFFICIENT GROUND FOR INJUNCTION.

It is not alleged that the defendant has done, or is contemplating doing, anything other than what is commanded of him by said act of June 27, 1902. It is admitted inferentially, if not expressly, that the acts complained of are fully authorized by said law. The basis of these proceedings is the allegation that said act of Congress is unconstitutional and void. It has,

however, been laid down by this court in many cases that the fact that a law is unconstitutional does not of itself entitle a party to relief by injunction to prevent the performance of acts commanded by that law. Several of the cases in which this has been held are cited in *Cruickshank* v. *Bidwell* (176 U. S., 73, 80), where the rule is stated as follows:

> It is settled that the mere fact that a law is unconstitutional does not entitle a party to relief by injunction against proceedings in compliance therewith, but it must appear that he has no adequate remedy by the ordinary processes of the law, or that the case falls under some recognized head of equity jurisdiction. (*Shelton* v. *Platt*, 139 U. S., 591; *Allen* v. *Pullman Palace Car Company*, 139 U. S., 658; *Pacific Express Company* v. *Seibert*, 142 U. S., 339; *Pittsburg, etc., Railway Company* v. *Board of Public Works*, 172 U. S., 32; *Arkansas Building and Loan Association* v. *Madden*, 175 U. S., 269.)

Reference is also made to *Mississippi* v. *Johnson* (4 Wall., 475, 499–500) for a discussion of this question. To maintain these proceedings the complainant must show some ground other than the unconstitutionality of the act in question.

OTHER ALLEGATIONS INSUFFICIENT.

Considering all the averments found in the bill they amount simply to the allegation that Congress is guilty of a breach of trust. The statements further show, however, that any damages which could result from such alleged breach of trust are of a pecuniary nature

and readily ascertainable in amount. This being true, the bill does not present any sufficient reason for invoking the extraordinary remedy of injunction. In *Cruickshank* v. *Bidwell* the court further said (p. 81):

> The sole ground of equity jurisdiction put forward is the inadequacy of the remedy at law in that the injury threatened is not susceptible of complete compensation in damages. The mere assertion that the apprehended acts will inflict irreparable injury is not enough. Facts must be alleged from which the court can reasonably infer that such would be the result, and in this particular we think the bill fatally defective.

The assertion in this bill that the apprehended acts will inflict irreparable injury is not borne out by the facts as shown by the bill. It is not averred that the injury threatened here is not susceptible of complete compensation in damages. In fact, the allegations of the bill establish the contrary condition. It is alleged that the breach of trust will impose upon the complainant a pecuniary loss, growing out of the failure to sell a part of the timber upon the ceded lands and of the refusal by Congress to open to settlement and disposition certain defined portions of the ceded lands. The bill alleges that the agricultural lands are of the value of $1.25 per acre, and this furnishes a basis for computing the loss to complainant by reason of the refusal to dispose of such lands in accordance with the provisions of the act of January 14, 1889. Under the provisions of said act of 1889, and also those of the act of June 27, 1902, the timber on all ceded lands

is to be appraised. It is clear, therefore, that the value of any timber that may not be sold can be easily ascertained; in fact, the bill itself contains averments as to the value of such timber.

Under conditions like these, where the only damages apprehended are pecuniary in nature and ascertainable, the complainant must explicitly state and show that proceedings at law to recover the amount of such damages would be unavailing. This was substantially the holding in *Cruickshank* v. *Bidwell* (*supra*), where the injury apprehended was the loss of the value of certain teas condemned by the collector of customs of New York. This bill does not aver that the complainant has not an adequate remedy at law for any apprehended damages, nor does it state facts which would justify the court in concluding that there is no such remedy. We respectfully submit, therefore, that the bill here does not present a condition of affairs that entitles the complainant to a writ of injunction to prevent this defendant from performing the acts required of him by said act of June 27, 1902, or to any relief in equity, and therefore ask that the decision appealed from be affirmed.

The subject-matter involved here is political in its nature and entirely outside the domain of the judiciary. Even if the suit had been brought in the name of the proper party, and if the bill had stated facts entitling the party to equitable relief, yet the court is without jurisdiction to grant such relief, because it has no power to control the political branch of the Government in the discharge of the duties committed there.

THE INDIANS ARE WARDS OF THE UNITED STATES.

The Indian tribes located within the geographical limits of the United States are not independent sovereign powers or nations, but dependent communities in all matters relating to their protection, government, civilization, support, and management of tribal property, subject to the supervision and control of the United States. In *Cherokee Nation* v. *Georgia* (5 Pet., 1, 17), Chief Justice Marshall described the Indians as "domestic dependent nations," as "in a state of pupilage," and said: "Their relation to the United States resembles that of a ward to his guardian." In *United States* v. *Kagama* (118 U. S., 375, 383), it is said: "These Indian tribes *are* the wards of the nation. They are communities dependent upon the United States. Dependent largely for their daily food, dependent for their political rights."

This doctrine has been repeated in later decisions, among which may be mentioned *Choctaw Nation* v. *United States* (119 U. S., 1, 25); *Cherokee Nation* v. *Southern Kansas Ry. Co.* (135 U. S., 641, 653); *Stephens* v. *Cherokee Nation* (174 U. S., 445, 484); *Lone Wolf* v. *Hitchcock* (187 U. S., 553, 566, 567). For many years the political branch of the Government accorded the various Indian tribes a certain degree of recognition as independent powers, in that treaties were negotiated with them and they were allowed to make laws and regulations in respect to their internal and tribal affairs. That policy was, however, definitely abandoned and a new policy, that of governing them by acts of Con-

gress, was announced by the act of March 3, 1871 (16 Stat., 544, 566), which contained a provision, afterwards carried into the Revised Statutes as section 2079, as follows:

> *Provided*, That hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty: *Provided further*, That nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe.

Speaking of this legislation this court has declared that the Indians are "subject to the power and authority of the laws of the United States when Congress should choose, as it did determine in the act of March 3, 1871, embodied in section 2079, Revised Statutes, to exert its legislative power" (*Choctaw Nation* v. *United States*, 119 U. S., 1, 27); and again: "The policy of the Government, however, in dealing with the Indian nations was definitely expressed in a proviso inserted in the Indian appropriation act of March 3, 1871." (*Stephens* v. *Cherokee Nation*, 174 U. S., 445, 483.) In *Cherokee Nation* v. *Hitchcock* (187 U. S., 294, 305) the court said:

> Prior to the act of March 3, 1871, 16 Stat., 544, 566, now section 2079 of the Revised Statutes, which statute, in effect, voiced the intention of Congress thereafter to make the Indian tribes amenable directly to the power

> and authority of the laws of the United States by the immediate exercise of its legislative power over them, the customary mode of dealing with the Indian tribes was by treaty. As, however, held in *Cherokee Nation* v. *Southern Kansas Railway Co.* (135 U. S., 641, 653), reaffirmed in *Stephens* v. *Cherokee Nation* (174 U.S., 445, 484), while the Cherokee Nation and other Indian tribes domiciled within the United States had been recognized by the United States as separate communities, and engagements entered into with them by means of formal treaties, they were yet regarded as in a condition of pupilage or dependency and subject to the paramount authority of the United States.

The same doctrine is announced in *Lone Wolf* v. *United States* (187 U. S., 553, 565–566), wherein the court quoted from *United States* v. *Kagama*.

It is clear from these authorities that Congress had full power to assume direct control of the Indians and their property, as it did by said act of March 3, 1871. That Congress may have chosen, as it did in the act of 1889 and in other instances, to authorize the negotiation of agreements with the Indians, or to secure the consent of the Indians to enactments affecting their property, does not in any way modify or detract from the force of the legislation enacted by said act of 1871. The failure of Congress to exercise any legislative power vested in that body, or to exercise it in a specified manner, does not destroy the power or foreclose resort to the specified manner when occasion arises for

its use. (*Chicago, Burlington & Quincy R. R. Co.* v. *Iowa*, 94 U. S., 155, 162.) That Congress saw fit in the act of 1889 to present the matter to the Indians for their concurrence did not in any wise affect the power of Congress to further legislate in their behalf without submitting the matter to them, as it did in the act of June 27, 1902. This act is therefore not unconstitutional on the ground that Congress had not authority in the premises to legislate directly upon the matter without securing the assent of the Indians thereto.

THE INDIANS BEING WARDS OF THE UNITED STATES THE POWER AND DUTY OF CONTROLLING THEIR PROPERTY RESTS WITH THE POLITICAL BRANCH OF THE GOVERNMENT.

The authorities to be cited in the discussion of this phase of the case are necessarily in large part those referred to in the preceding discussion. The propositions being closely allied would very naturally and probably come up for consideration together. In every instance where the matter has been presented the courts have disavowed authority to exercise control over the political branch of the Government in transactions with the Indians and have stated and reiterated the proposition that redress for any injury suffered by the Indians must be sought from Congress.

In *Cherokee Nation* v. *Southern Kansas Ry. Co.* (135 U. S., 641, 654), the court, after referring to the treaties of 1835, 1846, and 1866, as recognizing the Cherokees as a separate and distinct people, and as

guaranteeing them the title and possession of their lands and jurisdiction over their country, said:

> But neither these nor any previous treaties evinced any intention upon the part of the Government to discharge them from their condition of pupilage or dependency and constitute them a separate, independent, sovereign people, with no superior within its limits.

In *Stephens* v. *Cherokee Nation* (174 U. S., 445), after a long extract from *Cherokee Nation* v. *Southern Kansas Ry. Co.*, characterized as sufficiently showing the general power of Congress over the Indian tribes, it was said (p. 486):

> Such being the position occupied by these tribes (and it has often been availed of to their advantage), and the power of Congress in the premises having the plentitude thus indicated, we are unable to perceive that the legislation in question is in contravention of the Constitution

That case presents, perhaps, the most notable instance of the exercise of the power vested in Congress over the property of Indians. The Cherokees and other nations constituting the Five Civilized Tribes had, by various treaties, been recognized as separate peoples; had been assured the title and possession of their lands and jurisdiction over their country, and had been given patents for their lands with the single condition that they should not be sold except to the United States. Congress, concluding that the experiment of self-government by these peoples had proved a failure, and that they were not properly managing

their affairs, determined to interpose its authority and to assume full control over them. By the acts of June 10, 1896 (29 Stat., 321, 339), and June 7, 1897 (30 Stat., 62, 84), provisions were made for deciding the claims to citizenship in the respective nations and for making rolls of citizens. By the act of June 28, 1898 (30 Stat., 495), it was provided that a commission should proceed to allot the exclusive use of the surface of the lands among the citizens of the nations, such allotments to be confirmed by the Secretary of the Interior, that the minerals in their lands should be leased by the Secretary of the Interior, that town sites should be platted and the lots sold, that all leases of agricultural lands made by the tribe or any member thereof prior to January 1, 1898, should be absolutely void, that the laws of the tribe should not after the date of the act be enforced by the courts of the United States in Indian Territory, and that on July 1, 1898, all tribal courts should be abolished. In short, by said act Congress ousted the Cherokee Nation of all control over its own affairs and assumed complete jurisdiction thereof. This court fully sustained the power of Congress in the premises and declared "the entire legislation constitutional." After once asserting the plenary power of Congress in the premises the court, as if to emphasize the proposition and avoid the possibility of any mistake, said (p. 488):

> We repeat that in view of the paramount authority of Congress over the Indian tribes,

> and of the duties imposed on the Government by their condition of dependency, we can not say that Congress could not empower the Dawes Commission to determine, in the manner provided, who were entitled to citizenship in each of the tribes, and make out correct rolls of such citizens, an essential preliminary to effective action in promotion of the best interests of the tribes. * * *

In *Barker* v. *Harvey* (181 U. S., 481, 492) the court described the Indians as wards of the Government, and placed the obligations incident to the guardianship upon Congress, saying:

> It is undoubtedly true that this Government has always recognized the fact that the Indians were its wards, and entitled to be protected as such, and this court has uniformly construed all legislation in the light of this recognized obligation. But the obligation is one which rests upon the political department of the Government, and this court has never assumed, in the absence of Congressional action, to determine what would have been appropriate legislation, or to decide the claims of the Indians as though such legislation had been had. * * *

The doctrine was discussed by the Court of Appeals of the District of Columbia in *Lone Wolf* v. *Hitchcock* (19 App. D. C., 315), wherein the court cited various authorities and concluded that in view of the dependent relation of the Indian tribes to the United States and the plenary power of Congress over them, the court had no jurisdiction in the premises. This conclusion

was fully sustained by this court upon appeal (187 U. S., 553). The same views were clearly expressed in *Cherokee Nation* v. *Hitchcock* (187 U. S., 294).

In *Minnesota* v. *Hitchcock* (185 U. S., 373) the State claimed that the extinguishment of the Indian right left sections 16 and 36 of each township of the lands affected subject to the grant to the State for public schools. After stating that the fee of those lands was in the United States subject to the right of occupancy by the Indians, and that the Government might convey that fee, the court said:

> At the same time the Indian's right of occupancy has always been held to be sacred; something not to be taken from him except by his consent, and then upon such consideration as should be agreed upon.

It may be claimed that by this statement the court has asserted that Congress has no power to determine the right of occupancy of an Indian tribe except by means of negotiations and agreement with the Indians, and therefore that it is opposed to the proposition that Congress has plenary power in such matters. The statement can not be given that interpretation. In *Beecher* v. *Wetherby* (95 U. S., 517) the court said that the occupancy of Indians could be "interfered with or determined" only by the United States and that while the United States should be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race, yet the propriety or justice of their action toward the

Indians with respect to their lands is a question of governmental policy. It has always been held that the courts have no power to decide questions of governmental policy or to control the political branch of the Government in such matters. In *Lone Wolf* v. *Hitchcock* (187 U. S., 433, 565) the court quoted from *Beecher* v. *Wetherby* (*supra*), and followed the quotation with the statement:

> Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the Government.

In view of the explicit disavowal, found in both the earlier and later decisions, of any power in the courts to control the political branch of the Government in its dealings with the Indians, in respect of their occupancy right in lands the fee of which remained in the United States, it can not be said that the court meant, in the statement quoted from *Minnesota* v. *Hitchcock*, to lay down a different rule or to assert that such dealings involved questions that may be presented to and decided by the judicial branch of the Government. It is evident the court was stating a rule of morals proper to be observed by the political branch of the Government in dealings with the Indians and was not laying down a rule of law to control in such matters and to be enforced by appeal to the courts. In *Blackfeather* v. *United States* (190 U. S., 368, 370), the court said:

> The moral obligations of the Government toward the Indians, whatever they may be, are for Congress alone to recognize, and the courts can exercise only such jurisdiction over the subject as Congress may confer upon them.

We insist that the proposition that Congress has plenary power over the property of the Indians, wards of the Government, is sound in principle, and that the overwhelming array of authorities supporting it ought to close the door to further discussion of it. The complainant here can hope to secure consideration of the questions presented by his bill only upon the theory that that proposition is still within the realm of debate. He can secure the relief prayed for only upon the theory that that proposition is not sound. We respectfully submit that both positions are wholly untenable, and that therefore the demurrer was properly sustained and the bill dismissed by the lower court, and that its action should be affirmed by this court.

THE POWER AND DUTY OF CONGRESS IN RESPECT OF GUARDIANSHIP DOES NOT END WHEN THE INDIAN ATTAINS CITIZENSHIP.

The amendment of the bill herein by inserting the averment that the complainant is a citizen of the United States indicates that some importance is attached to that fact in connection with the questions to be decided. Some of the Chippewa Indians have become citizens of the United States, but many have not as yet attained that dignity. The change of condition in this direction does not alter their relationship to the Government in respect of their common or

tribal property. That still remains as before to be protected, managed, and administered by the Government. The status of citizenship is not incompatible with membership in an Indian tribe nor with wardship. This has been held in many cases, among which are *Eells* v. *Ross* (64 Fed. Rep., 417, 420); *Beck* v. *Flournoy Live Stock Co.* (65 Fed. Rep., 30, 35); *United States* v. *Flournoy Live Stock Co.* (69 Fed. Rep., 886, 891); *Farrell* v. *United States* (110 Fed. Rep., 942); *State* v. *Columbia George* (65 Pac. Rep., 604); *Cherokee Nation* v. *Hitchcock* (187 U. S., 294, 308), and *United States* v. *Rickert* (188 U. S., 432).

In *Farrell* v. *United States* (*supra*) the court, in discussing the status of an Indian who has become a citizen of the United States by virtue of having received an allotment under the act of February 8, 1887 (24 Stat., 388), said (p. 950):

> Neither the act of 1887 nor any other act of Congress or treaty with these Indians required those who selected allotments and received patents and the privileges and immunities of citizenship to sever their tribal relation, or to surrender any of their rights as members of their tribes, as a condition of the grant, so that after their allotments, as before, their tribal relation continued. * * *

In *State* v. *Columbia George* (*supra*) the Supreme Court of Oregon, having a similar question presented, said:

> It would seem therefore that citizenship, such as extends, within the purview of the

> Dawes Act [general allotment act], to Indian allottees, is neither inconsistent nor incompatible with the status of a tribal Indian; that the Government, while it has bestowed citizenship, has not thereby relinquished the guardianship of the tribes, indulging them yet a little while, but with greatly restricted authority, in their primitive government; and until the General Government has taken its hands off and relinquished supervision over its Indians, the State courts can not assume jurisdiction touching the criminal acts of one against another.

Hitchcock v. *Big Boy* (22 App. D. C., 275) involved the question as to the right of the Government to exercise the functions of a guardian over Indian citizens in respect of property received from the United States, and to place restrictions upon its use. The court asserted the authority to impose restrictions, and said:

> The matter of citizenship is an entirely extraneous thing and has nothing whatever to do with the case. The question is whether the United States have restricted, and how far they have restricted, the use of the property which they have themselves granted. For, of course, under our theory of the respective rights of the United States and of the Indians, the lands allotted to the latter, either as tribal reservations or in severalty, are the property of the United States, and the latter may restrict the use of them by the Indians and the proceeds of sale thereof to any extent to which it is feasible to go.

In the decision of the United States Circuit Court of Appeals rendered March 21, 1906, in *United States* v.

County of Thurston et al., this question was discussed at some length. In that case a bill was presented by the United States asking that the officers of Thurston County, Nebr., be enjoined from levying taxes upon money arising from the sales of lands held in trust by the United States for heirs of deceased Indian allottees. A demurrer to the bill, apparently upon the ground that the United States had no such beneficial interest in the fund in question as to except it from taxation by the State, was sustained and the bill dismissed for want of equity by the District Court (140 Fed. Rep., 456). Upon appeal the decree below was reversed. In the course of the opinion it was said:

> In the consideration of the questions which the bill presents the assumption will be indulged that the Indians for whose benefit the proceeds of these lands are held are citizens of the United States and of the State of Nebraska. Their civil and political status, however, does not condition the power, authority, or duty of the United States to exert its powers of government to control their property, to protect them in their rights, to faithfully discharge its legal and moral obligations to them and to execute every trust with which it is charged for their benefit. (Matter of Heff, 197 U. S., 488, 509; *Buster* v. *Wright*, 68 C. C. A., 505; 135 Fed., 947; *Wallace* v. *Adams* * * * C. C. A * * *, * * * Fed. * * *, decided at this term.)

If this power of control exists as to the property of the individual it certainly does as to the property of

the tribe or community. The exercise of this power, authority, or duty is a political function resting in the political branch of the Government entirely outside the jurisdiction of the judiciary. Speaking of this authority over and control of the property of the Indians vesting in the United States, this court, in the *Matter of Heff* (197 U. S., 488, 499), said:

> It may abandon its guardianship and leave the ward to assume and be subject to all the privileges and burdens of one *sui juris*. And it is for Congress to determine when and how that relationship of guardianship shall be abandoned. It is not within the power of the courts to overrule the judgment of Congress.

It seems to be the impression in some quarters that this court in that case announced in effect that the conferring of citizenship upon an Indian relieved him and his property from the control of the Government; but we do not so read it. That case involved the exercise of police powers and involved the political rights of citizens of a State. The court expressed adherence to its decisions, especially that in *United States* v. *Rickert* (188 U. S., 432), sustaining the right of the Government to protect property held by it in trust for Indians, holding, however, that when the United States grants the privileges of citizenship to an Indian "it places him outside the reach of police regulations on the part of Congress."

The only conclusion to be drawn from a review of these various decisions of the courts is that the status of these Indians in respect of citizenship is not a factor

in determining the questions involved in this proceeding. Whatever their status as individuals may be the property rights involved are tribal or communal in character, to be administered by the Government through the political branch thereof.

LEGISLATIVE CONTROL OF PROPERTY OF WARDS.

The Indians being wards of the nation, the act of July 27, 1902, may be fully sustained under the doctrine of *parens patriæ*. For a discussion of this doctrine reference is made to Cooley's Constitutional Limitations (6th ed., p. 117, et seq.). The question came before this court in *Hoyt* v. *Sprague* (103 U. S., 613), and the court, after asserting that the legislative power extended to the regulation and management of minors' estates and that such laws had been frequently passed in almost every State in the Union, and had received the sanction of the Supreme Court and other courts of high authority, said:

> * * * The exercise of this power has been most conspicuous in that class of cases in which the legislature has been called upon to act as *parens patriæ* on behalf of lunatics, minors, and other incapacitated persons. Laws authorizing the sale of the estates of such persons have frequently been passed and have been upheld as fairly within the legislative power. The passage of such laws is not the exercise of judicial power, although by general laws the discretion to pass upon such cases might be confided to the courts. But when it is not confided to the courts the power exercised is of a legislative

> character, the legislature making a law for the particular case. In some modern constitutions the exercise of this power has been prohibited by the legislative department. But where not so prohibited, and where it has never been authoritatively condemned in the jurisprudence of the State, we can not deny to the legislature the right to exercise it in those cases in which it has been accustomed to be exercised, among which, we think, the present case may be fairly reckoned. Such laws are not judgments upon any person's rights, but they confer powers upon the exercise of which judgment may afterwards be given.

The doctrine has also been discussed by many of the supreme courts of the various States. See *Rice* v. *Parkman* (16 Mass., 326); *Louisville, etc., R. R. Co.* v. *Blythe* (30 Am. State Rep., 599 [Miss.]); *Henderson* v. *Dowd* (116 N. C., 195); *Davidson* v. *Johannot* (7 Metcalf, 388); *Cochran* v. *Van Surlay* (20 Wend., 365). That the doctrine of *parens patriæ* is recognized in this country as vested in the supreme legislative power under whose jurisdiction the incompetent may come, is shown in *Wheeler* v. *Smith* (9 How., 55, 77); *Fontain* v. *Ravenel* (17 How., 369, 384), and *Mormon Church* v. *United States* (136 U. S., 1, 57). These Indians are living within the geographical limits of the United States; are not subject in their tribal capacity to the jurisdiction or control of any State; they can not protect themselves or their property, and are clearly of that class of persons whose rights and interest must be protected and controlled by the sovereign authority

under whose jurisdiction they come as *parens patriæ*. As already shown they are wards of the Government; therefore the prerogative of *parens patriæ* of these Indians is lodged in Congress and that body has not seen fit to delegate the exercise of these powers to any judicial or other body. The act of June 27, 1902, was clearly within the general scope of the power of Congress in the exercise of this prerogative and the courts can not pronounce it void or inquire whether it accords with their ideas of justice.

AN ACT OF CONGRESS MAY SUPERSEDE A TREATY.

The theory upon which this bill is presented is that by the agreements of relinquishment made under the provisions of the act of January 14, 1889, the Indians secured a vested right to have the conditions upon which those relinquishments were made fully and exactly performed in the manner therein prescribed. This theory has no good foundation. The agreements whose sanctity is so strenuously urged can have no greater force than did treaties with the various Indian tribes made prior to the act of 1871. That the provisions of a treaty may be varied or annulled by a subsequent act of Congress has been declared by this court every time the question has arisen. The general rule was laid down in *Head Money cases* (112 U. S., 580, 597–599); *Whitney* v. *Robertson* (124 U. S., 190, 194); *Botiller* v. *Dominguez* (130 U. S., 238, 247); *The Chinese Exclusion case* (130 U. S., 581, 602); *Horner* v. *United States* (143 U. S., 570, 578); and *Barker* v. *Harvey* (181 U. S., 481, 488). The first

case in which the doctrine was applied to Indian treaties is the *Cherokee Tobacco case* (11 Wall., 616, 621). There a law had been passed by Congress declaring that the internal revenue laws should be held to extend to the taxed articles produced anywhere in the exterior boundaries of the United States. It was claimed that this provision did not have operation in the Cherokee Nation because in conflict with the provisions of a prior treaty of 1866. The court recognized the fact that the repugnancy was clear, and that the two provisions could not stand together, but held that the earlier treaty must yield to the later law. After referring to the cases of *Foster* v. *Neilson* (2 Pet., 314), *Taylor* v. *Morton* (2 Curtis, 454), and *The Clinton Bridge* (1 Walworth, 155) as supporting the general proposition that a treaty may supersede a prior act of Congress, and that an act of Congress may supersede a prior treaty, the court said:

> * * * In the cases referred to these principles were applied to treaties with foreign nations. Treaties with Indian nations within the jurisdiction of the United States, whatever considerations of humanity and good faith may be involved and require their faithful observance, can not be more obligatory. They have no higher sanctity, and no greater inviolability or immunity from legislative invasion can be claimed for them. The consequences in all such cases give rise to questions which must be met by the political department of the Government. They are beyond the sphere of judicial cognizance. In the case under considera-

> tion the act of Congress must prevail as if the treaty were not an element to be considered. If a wrong has been done, the power of redress is with Congress, not with the judiciary, and that body, upon being applied to, it is to be presumed, will promptly give the proper relief.

The doctrine is also recognized in respect of treaties with Indians in *United States* v. *Old Settlers* (148 U. S., 427, 468); *Spalding* v. *Chandler* (160 U. S., 394, 405–406); *Ward* v. *Race Horse* (163 U. S., 504, 511); *Thomas* v. *Gay* (169 U. S., 264, 270–271); *Stephens* v. *Cherokee Nation* (174 U. S., 445, 483); *United States* v. *Choctaw Nation* (179 U. S., 494, 532); *Lone Wolf* v. *Hitchcock* (187 U. S., 553, 566). The statement of the doctrine was in almost every instance followed by a declaration to the effect that any questions which may arise are beyond the sphere of judicial cognizance. Many of these statements are specifically referred to and quoted hereinafter.

ESTABLISHED PRINCIPLES APPLIED TO THE FACTS IN THIS CASE.

By the act of January 14, 1889 (25 Stat., 642), the lands to which the Indians relinquished their right of occupancy were to be classified as "pine lands" and "agricultural lands," the timber on the pine lands to be appraised and those lands to be sold at not less than the appraised value of the timber; the agricultural lands were to be disposed of to homestead settlers with the requirement of a payment of $1.25 per acre. By the act of May 17, 1900 (31 Stat., 179), commonly known as the "free homesteads act," settlers upon

agricultural lands freed from Indian right of occupancy and opened to settlement prior thereto were relieved from any payment except the usual and customary fees. This could not, however, have any effect upon the questions involved here, because in said act is a proviso: "That all sums of money so released, which if not released would belong to any Indian tribe, shall be paid to such Indian tribe by the United States." The proceeds of the sales, after paying expenses, were to be deposited in the Treasury of the United States to the credit of the Chippewa Indians as a permanent fund. This act of 1889 was amended by the act of June 27, 1902 (32 Stat., 400), the constitutionality of which is attacked in this proceeding, whereby it was provided that the merchantable pine timber on the pine lands should be sold at public auction and that after the timber had been removed therefrom those lands should be classified and disposed of as agricultural lands. No change was made in respect to the disposition of agricultural lands and no change was made as to the disposition of the money arising from the sale of the timber and lands. It was, however, further provided that in cutting the timber on 200,000 acres of pine land, to be selected on the reservations known as the Chippewas of the Mississippi, Leech Lake, Cass Lake, and Winnebegoshish, to be known as "forestry lands," the purchaser should be required to leave standing 5 per centum of the pine timber thereon for the purpose of reforestation. It was further provided that on the

forestry lands, as soon as the timber is removed from any tract, subdivision, or lot, such tract, subdivision, or lot shall, without further act, resolution, or proclamation become and be a forest reserve the same as though set apart by proclamation of the President, in accordance with the act of Congress of March 3, 1891. There was also reserved from sale or settlement the timber and land on the islands in Cass Lake and Leech Lake, and not less than 160 acres at the extremity of Sugar Point, on Leech Lake and the peninsula known as Pine Point, on which the Leech Lake Indian Agency is now located, approximating 7,000 acres, and in addition thereto ten sections in area on said reservations to be selected in lots not less than 320 acres each, with the provision that the islands in Cass and Leech lakes, and the land reserved at Sugar Point and Pine Point peninsula, should remain as Indian land under the control of the Department of the Interior. In so far as the manner of selling the timber and lands was changed by this later act Congress was acting well within its authority as defined by the decisions hereinbefore cited. This later act in that respect was simply the exercise of the plenary power of Congress in the administration of the property of the Indians. That this change will work to the benefit of the Indians is reasonably certain. Under the act of 1889 the pine lands were to be sold with the timber standing. Lumbermen would be the purchasers because they only would be able to utilize the timber. The timber constituted the only measure of value to

these, the only probable purchasers. Under the new scheme the timber was to be first sold separately from the land. The lumbermen will be the purchasers and the measure of value will be the same as when the timber and land were to be sold together. The land will, however, remain to be disposed of as agricultural land at $1.25 per acre. The advantage to the Indians is obvious. Under the law as originally enacted the Secretary of the Interior immediately upon the sale lost control over the land and could not effectually compel the clearing off of brush and refuse resulting from the cutting of the timber. If the brush and refuse are not piled and burned the danger of fire is great, with the probable result of destruction of timber on adjacent tracts not yet sold. Under the amendatory provision the Secretary of the Interior retains control of the land from which the timber is to be cut, and may make and effectually enforce such rules and regulations as to the piling and burning of brush and refuse as will remove the danger of fire. That he has exercised this power in a salutary manner is abundantly shown by the regulations prescribed and shown in Exhibit A to the bill herein. (Record, pp. 26–27.) The amendatory provisions directing the sale of the timber on these lands separately were clearly to the advantage of the Indians, and the enactment of these provisions was a wise exercise of the power vested in Congress to administer the affairs of the Indians. But whether that power was wisely exercised can not be inquired into by the courts. As

was said in *Lone Wolf* v. *Hitchcock* (*supra*, p. 565), plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one not subject to be controlled by the judicial department of the Government. And again (p. 568):

> * * * Indeed, the controversy which this case presents is concluded by the decision in *Cherokee Nation* v. *Hitchcock* (187 U. S., 294), decided at this term, where it was held that full administrative power was possessed by Congress over Indian tribal property. In effect, the action of Congress now complained of was but an exercise of such power, a mere change in the form of investment of Indian tribal property, the property of those who, as we have held, were in substantial effect the wards of the Government. We must presume that Congress acted in perfect good faith in the dealings with the Indians of which complaint is made, and that the legislative branch of the Government exercised its best judgment in the premises. In any event, as Congress possessed full power in the matter, the judiciary can not question or inquire into the motives which prompted the enactment of this legislation. If injury was occasioned, which we do not wish to be understood as implying, by the use made by Congress of its power, relief must be sought by an appeal to that body for redress and not to the courts. The legislation in question was constitutional, and the demurrer to the bill was therefore rightly sustained.

The decisions conclusively demonstrate that as to this branch of the case the demurrer is well founded and that the bill can not be sustained.

It is equally clear that as to the other branch of the case—that is, the withholding of certain portions of the land from sale—the courts are without jurisdiction. That Congress has the power to appropriate for public purposes lands to which the Indians claim a right of occupancy has been sustained in numerous decisions. In *Missouri, Kansas and Texas Ry. Co.* v. *Roberts* (152 U. S., 114) the question was as to the effect of legislation granting a railroad right of way through an Indian treaty reservation without the consent of the Indians and without compensation. The court said:

> * * * That grant was absolute in terms, covering both the fee and possession, and left no rights on the part of the Indians to be the subject of future consideration. Though the law, as stated with reference to the power of the Government to determine the right of occupancy of the Indians to their lands has always been recognized, it is to be presumed, as stated by this court in the Buttz case, that in its exercise the United States will be governed by such considerations of justice as will control a Christian people in their treatment of an ignorant and dependent race, the court observing, however, that the propriety or justice of their action toward the Indians, with respect to their lands, is a question of governmental policy, and is not a matter open to discussion in a controversy between third parties, neither of whom derives title from the Indians.

In *Spalding* v. *Chandler* (160 U. S., 394, 405–406) there was a like question as to the grant of a right of way across an Indian reservation established under a treaty, and the court said:

> The purposes of the treaty could not be defeated by the action of executive officers of the Government. (*United States* v. *Carpenter*, *supra*.) As a matter of fact, therefore, the Indian reserve continued to exist and to be used for the purposes for which it came into existence long after the President's orders of 1847. As stated, the reserve was not extinguished or the rights of the Indians to the use of the tract destroyed or curtailed by those orders, and if the reservation for public uses and for the purposes of Fort Brady made by the President's orders was valid, the operation of those orders so far as the Indian reserve was concerned was clearly postponed until after the extinguishment of the reserve either by a voluntary cession to the Government, a cessation or abandonment of the use, *or the arbitrary exercise by Congress of its power to appropriate the same*.
>
> * * * Whatever the reason, however, for the omission to make mention of the Indian reserve, *the power existed in Congress to invade the sanctity of the reservation and disregard the guaranty contained in the treaty of 1820, even against the consent of the Indians party to that treaty*, and as the requirement of the grant necessarily demanded the possession of the portion of the reserve through which the canal was to pass, the effect of that act was to

> extinguish so much of the Indian reserve as was embraced in the grant to the State for canal purposes.

The right of the Indians to have this land applied in the manner directed by the act of 1889 is not more sacred than their rights to have the provisions of the treaties involved in those cases strictly observed. If Congress had the power to deprive the Indians of the use of land guaranteed them under solemn treaties, as was held in those cases, it has the power to divert these lands to the use of the Government despite the provisions of the act of 1889. The use to which the lands and timber withheld from sale by the act of 1902 are to be devoted is a public use. The subject of reforestation of lands denuded of their timber is engaging the serious attention of the public generally and is being given careful consideration by the President and the officers within whose jurisdiction the matter comes. No objection to this legislation upon the ground that the use contemplated is not public in nature can be sustained. If any injustice shall be done by the exercise of the power thus vested in Congress, redress must be sought from the political branch of the Government. Especially in point here is the declaration in *The Cherokee Tobacco case* (11 Wall., 616, 621), where, after asserting that the provisions of a treaty with the Indians may be superseded by a later act of Congress, it was said:

> The consequences in all such cases give rise to questions which must be met by the political

> department of the Government. They are beyond the sphere of judicial cognizance. * * * If a wrong has been done, the power of redress is with Congress, not with the judiciary, and that body upon being applied to, it is to be presumed, will promptly give the proper relief.

To the same effect is a statement in *Thomas* v. *Gay* (169 U. S., 264, 270–271), where the question was as to the effect of an act of Congress upon a former treaty with the Indians, as follows:

> It is well settled that an act of Congress may supersede a prior treaty, and that any questions that may arise are beyond the sphere of judicial cognizance and must be met by the political department of the Government.

This statement is quoted with approval in *Stephens* v. *Cherokee Nation* (174 U. S., 445, 485), and the same doctrine is reaffirmed in *United States* v. *Choctaw Nation* (179 U. S., 494, 538), where the court said:

> We may repeat that if wrong was done to the Indians by the treaty of 1866, interpreted as we have indicated—and we are not to be understood as expressing the opinion that they were not under all the circumstances fairly dealt with—the wrong can be repaired by that branch of the Government having full power over the subject.

In *Cherokee Nation* v. *Hitchcock* (*supra*) the court concluded its decision in the following words (p. 308):

> We are not concerned in this case with the question whether the act of June 28, 1898, and the proposed action thereunder, which is com-

> plained of, is or is not wise, and calculated to operate beneficially to the interests of the Cherokees. The power existing in Congress to administer upon and guard the tribal property, and the power being political and administrative in its nature, the manner of its exercise is a question within the province of the legislative branch to determine, and is not one for the courts.

In *Lone Wolf* v. *Hitchcock* (*supra*) it was said (p. 568):

> * * * We must presume that Congress acted in perfect good faith in the dealings with the Indians of which complaint is made, and that the legislative branch of the Government exercised its best judgment in the premises. In any event, as Congress possessed full power in the matter, the judiciary can not question or inquire into the motives which prompted the enactment of this legislation. If injury was occasioned, which we do not wish to be understood as implying, by the use made by Congress of its power, relief must be sought by an appeal to that body for redress and not to the courts. The legislation in question was constitutional, and the demurrer to the bill was therefore rightly sustained.

That the presumption as to the efficacy of an appeal to the political department is well founded is demonstrated by the case of New York Indians (170 U. S., 1). Those Indians claimed that certain lands which had been granted them had been sold without their consent and to their injury. Upon presentation of the

matter to Congress their claim was referred to the Court of Claims, and the proceedings resulted in a judgment in favor of the Indians.

It may not be inappropriate to note some defects in the bill in connection with this branch of the case. The act of 1902 provides that the "forestry lands" and the ten sections reserved from sale shall be selected "by the forester of the Department of Agriculture." That officer is not made a party to the suit and the bill contains no allegation as to what action, if any, he has taken. Until the selections are determined upon by that officer, the Secretary of the Interior has no duty to perform in respect of the designation of the tracts to be brought within said provisions of the law. The complainant should show facts which justify the conclusion that action by the Secretary of the Interior is imminent to warrant injunction to restrain him. It is alleged that the Secretary of the Interior "has actually set aside and authorized the setting aside of nearly 300,000 acres of pine lands aforesaid as a perpetual forest reserve." The law is self-executing to effect the setting aside of the forestry lands, after their selection by the forester of the Department of Agriculture with the approval of the Secretary of the Interior. If by the statement quoted it is meant to aver that selections have been made, and that is the natural inference to be drawn, then the Secretary of the Interior has no further duty to perform in respect to the reservation of such lands. The bill as to these particulars is indefinite and insufficient, and therefore clearly subject to demurrer. But

even if that were not so, the fact remains that the demurrer was well taken and the bill properly dismissed, upon the ground that the subject-matter is beyond the sphere of judicial cognizance. The authorities cited and quoted from speak in no uncertain tone, and are, we submit, conclusive. Under them the act of June 27, 1902, must be held constitutional, as being a valid exercise of the power vested in Congress. They leave no reason or excuse for appealing to the rule that "every possible presumption is in favor of the validity of a statute," and where the constitutionality of a law is questioned every doubt must be solved in favor of its validity.

APPELLANT'S CONTENTIONS.

While it is believed that all the points presented and discussed in the brief and argument of appellant's counsel have been considered in the preceding pages and perhaps sufficiently commented upon to put before the court our views, it may not be inappropriate to again specifically refer to some of them and point out wherein we believe the conclusions reached by appellant's counsel are erroneous and to indicate why we consider certain other points presented by him unimportant because of being wholly impertinent and irrelevant to the issue presented here. As admitted by appellant the ultimate title to lands occupied by Indians has been and is in the United States. The ordinary Indian right is that of occupancy and that is the only right these Indians ever had in these lands. The policy involved in the legislation looking to the

extinguishment of this occupancy right of the Chippewa Indians was not at all a new policy. The course pursued was the ordinary one of negotiation. This method has been usually resorted to although the Government might, by direct legislation without consulting the Indians, have terminated this right of occupancy.

These lands were not as asserted by appellant's counsel "private property of appellant and said others." This point has been sufficiently discussed in other portions of this brief.

Under the heading "Law of Forest Reserve," counsel refers to various laws relating to forest reserves and arrives at the conclusion that because those laws provide "that forest reserves must be taken from public lands," these lands could not be taken for that purpose. The argument must be that if Congress once legislates upon a subject it is forever thereafter foreclosed from other action on the same subject. The statement of the argument carries its own complete refutation. It is, moreover, absolutely unncessary to examine the laws thus referred to because it is not alleged that there is any intention of creating a forest reserve on these lands under authority of any general provision of law relating to such reserves, and the act of 1902 does not direct that. It might be admitted for the purpose of this discussion that the President would not have authority under the act of March 3, 1891 (26 Stat., 1095, 1103), to include these lands in a forest reserve, but such admission would be of no assistance in determining any question involved

here. The provisions of the act of 1891 and of all previous acts referred to in appellant's argument are wholly irrelevant and should not have been referred to as having any bearing in this case. Congress has directed that a part of the lands which have been relieved of the Indian right of occupancy shall be made a forest reserve, and the only question is as to the authority to so direct. That there is such authority is, we submit, clearly sustained upon principle and by the decisions of this court referred to and quoted from elsewhere herein.

As to the general proposition that an Indian may sue in the Federal courts, it is only necessary to say that it is not raised here. We contend that this suit is not brought by or upon authority of the proper party complainant and counsel has made no effort to refute that contention.

Under the heading "Enabling Act," counsel for appellant refers to and quotes from the decision of this court in *Minnesota* v. *Hitchcock* (185 U. S., 373). That decision simply holds that a third party can not intervene in dealings between the Government and the Indians to defeat the provisions of an agreement between them and that the Indians' rights in these lands had not been so unconditionally destroyed as to allow the State to claim them under a grant of public lands. This decision is not in anywise in conflict with both earlier and later decisions asserting the power of Congress to deal as it deems wise and proper with the Indians and their property. The effort to distinguish this case from *Cherokee Nation* v. *Kansas Ry. Co.* (135 U. S., 641); *Stephens* v.

Cherokee Nation (174 U. S., 445); *Barker* v. *Harvey* (181 U. S., 481), and *Lone Wolf* v. *Hitchcock* (187 U. S., 553), is not successful because, if for no other reason, it involves the false premise that the rights involved here are not tribal rights. The relationship of the United States to these Indians in respect of these lands is in nowise different from its relationship to other Indians generally who have ceded their occupancy rights with the provision that they are to receive the proceeds of the lands. The execution of any trust assumed in respect of Indians or their property rights is a matter for Congress alone to determine, and it is not subject in respect thereof to the direction, of the courts. If the Indians have cause of complaint they must seek their remedy in the proper forum, which is the political branch of the Government.

The points made by appellant's counsel under the heading "United States holds as trustee" are wholly irrelevant. The duties of the United States, whether it be considered trustee or guardian, are to be performed by the political branch, and, as we believe is conclusively shown elsewhere herein, are entirely without the jurisdiction of the judiciary.

Under the heading "Act Unconstitutional," appellant's counsel says (brief, p. 16):

> It is not necessary to argue here the question of due process of law or just compensation, for the reason that appellant and said others are deprived of this property and said rights without any compensation therefor, or any process of law, but simply by an act of Congress.

Due process of law does not always involve a hearing before and a determination by a judicial tribunal. An act of Congress may constitute due process of law. Discussing this phrase an eminent authority says (Cooley's Constitutional Limitations, 6th ed., p. 434):

> Due process of law in each particular case means such an exertion of the powers of Government as the settled maxims of law permit and sanction and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs.
>
> Private rights may be interfered with by either the legislative, executive, or judicial department of the Government. The executive department in every instance must show authority of law for its action, and occasion does not often arise for an examination of the limits which circumscribe its powers. The legislative department may in some cases constitutionally authorize interference and in others may interpose by direct action.

Continuing, counsel for appellant says:

> It may be said that if the foregoing contentions are admitted, the court nevertheless is without power to give direction to the United States, which is a trustee holding these Indian lands and the funds derived therefrom as property of appellant and said others and for their use.
>
> It would seem that if the court is without power or unwilling to give orders to said trustee to further administer said trust, it can and ought

> to enjoin the defendant herein from further executing or attempting to execute said act of June 27, 1902, and on the ground that said act is unconstitutional and void, and require accounting.

This is a clear admission of the inherent weakness of complainant's position. After substantially admitting the court has no power to give direction he suggests that even if without power in the premise, yet it should do that which would involve the exercise of power. The incongruity is so apparent that comment is unnecessary.

IN CONCLUSION.

It is alleged that the law in question will work an injury to the Indians. Even if this be true, the injury would be one remediable otherwise than by the process of injunction. We believe, however, that an analysis of the facts set forth in the bill justifies the conclusion that no injury to the Indians will result from said law, but that the execution of the provisions thereof will prove a decided benefit to them. That the result will be beneficial to the Indians may not be demonstrable to a mathematical certainty, but the facts set forth followed to their logical sequence lead to that conclusion. Under the amendatory provisions the Indians will certainly receive as much for the timber to be sold from the "pine lands" as they would have received had those lands been sold with the timber thereon under the act of 1889, the bids in either case being necessarily made upon the value of the timber alone. This conclusion logically results from the appli-

cation of recognized business principles to the existing conditions. After the sale of the timber the land remains to be disposed of as agricultural land at $1.25 per acre. As to the 200,000 acres of forestry lands there will be realized from the sale of the timber all that would have been realized from the sale of land and timber under the act of 1889, except, perhaps, the 5 per centum of timber which is to be reserved from sale. The bill alleges that there are 600,000 acres of pine timber on the four reservations—the Chippewas of the Mississippi, Leech Lake, Cass Lake, and Winnebegoshish—reasonably worth $10,000,000. The value of the timber reserved from sale (5 per centum) on the 200,000 acres of forestry lands would therefore be $166,000. The increased receipts from 400,000 acres by the sale of the timber and land separately under the act of 1902, over what would have been received for the land with the timber standing thereon, under the act of 1889, will be the amount to be realized from the sale of lands after the timber is removed, which is $1.25 per acre, or $500,000. Instead of suffering irreparable injury by reason of the amendatory act of 1902, it seems reasonably certain that the Indians will be greatly benefited thereby. It is clear that the facts alleged do not entitle the Indians to the relief prayed for, or to any relief.

It has happened that in recent years frequent and persistent efforts have been made to persuade the courts, and especially those of the District of Columbia, to take cognizance of matters purely political in their nature and usurp the functions of Congress, and to control the

Executive Department in dealings with the Indians through the extraordinary writs of mandamus and injunction. Sometimes the trial courts have given favorable consideration to such proceedings. In most instances the trial courts have refused to interfere, upon the ground of lack of jurisdiction, and in every case taken to an appellate tribunal the final decision has been a disavowal of jurisdiction.

One among the earliest of these cases was that of *Lone Wolf* v. *Hitchcock*, brought in the supreme court of the District, wherein the complainants, claiming to be duly authorized thereto by their tribe, sought to enjoin the defendant, as Secretary of the Interior, from carrying into effect an act of Congress, upon the ground that said act was unconstitutional and void in that it deprived the Indians of valuable property rights without their consent and to their irreparable injury. It will be noticed that the claims made here are strikingly similar to those made there. Upon demurrer the injunction was refused and the bill dismissed, upon the ground that the subject-matter being dealings between the Government and the Indians was outside the sphere of judicial cognizance. Upon appeal, that decision was affirmed by the Court of Appeals of the District of Columbia in a well-considered and logical decision (19 App. D. C., 315). Upon further appeal this court affirmed that decision. (187 U. S., 553.)

In *Cherokee Nation* v. *Hitchcock* it was likewise sought to prevent by injunction the execution of an act of Congress alleged to be unconstitutional in that it gave the defendant, as Secretary of the Interior,

power to lease certain lands of the nation, in disregard of the rights of the Indians guaranteed them by former treaties and to their irreparable injury. Upon demurrer the injunction was denied and the bill dismissed for lack of jurisdiction in the courts over the matter. That decision was affirmed by the Court of Appeals of the District of Columbia (20 App. D. C., 185), and, upon further appeal, by this court (187 U. S., 294). The decisions in these two cases settle conclusively the proposition that dealings between the Government and the Indians are political in their nature and that the courts have no control over them or power to interfere with the political branch of the Government in respect thereto. These two decisions follow numerous prior ones, and are only the logical sequences thereof. It would seem that if ever a legal principle is to be considered settled and placed beyond the pale of further discussion, the proposition that the control of the political department over the Indians is absolute, and that any question that may arise in connection with the exercise of such authority is entirely outside the sphere of judicial cognizance, presents such a principle.

We respectfully submit that the demurrer herein was properly sustained and the bill dismissed, and that the action of the court below should be affirmed.

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